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No. 91-843

# IN THE SUPREME COURT OF THE UNITED STATES

**October Term, 1991**

LITTLE FOREST MEDICAL CENTER OF AKRON,
*Petitioner,*

vs.

OHIO CIVIL RIGHTS COMMISSION,
*Respondent*

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**PETITION FOR A WRIT OF CERTIORARI**

**RESPONDENT'S BRIEF IN OPPOSITION**

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## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Ohio Civil Rights Commission, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ohio Supreme Court's opinion in this case.

## STATEMENT OF THE CASE

On October 29, 1986, Rayferd Lawson filed a charge of discrimination with the Ohio Civil Rights Commission (hereinafter "Commission"). In his charge, Mr. Lawson alleged that Little Forest Medical Center of Akron (hereinafter "Little Forest") refused to hire him on the basis of his sex.

After investigating Mr. Lawson's charge the Commission issued a Complaint on July 9, 1987 alleging that Little Forest engaged in sex discrimination. Little Forest filed an answer asserting that sex was a bona fide occupational qualification for a nurse's aid position.

A public hearing was held on October 14, 1987; January 19, 1988 and May 24, 1988. The Commission filed its post-hearing brief on June 23, 1988 and the Respondent filed its post-hearing brief on July 11, 1988. The Respondent argued among other things that "once the employer has made a prima facie showing that sex is a bona fide occupational qualification the burden shifts to the Ohio Civil Rights Commission to prove that reasonable alternatives exist which would moot the need for gender based discrimination." citing as authority *Hayes v. Shelby Memorial Hospital,* 726 F.2d 1543 (11th Cir. 1984); *Wright v. The Olin Corporation,* 697 F.2d 2292 (4th Cir. 1982).

The Hearing Examiner issued a report and recommendation on August 29, 1988. The Hearing Examiner's Conclusions of Law and Discussion 1-6 set forth the following:

> "2. Generally speaking the bfoq exception to the prohibition against sex discrimination is narrowly

construed. Respondent must justify the exception and the burden is a heavy one. *Fesel v. Masonic Home of Delaware, Inc.*, 447 F.2d 1334, 19 FEP Cases 887 (3rd Cir. 1979).

3. However, depending upon the circumstances, the courts have granted an exception, where the personal privacy rights of "customers" (patients) are at stake. *Fesel, supra.*

4. In these cases Respondent has the burden of proof. Respondent must prove: (a) there is a factual basis for its belief that women would object to intimate contact by male nurse's aides, and (b) it would not be possible to assign job responsibilities in such a manner as to minimize the clash between privacy rights of the patients and the antidiscrimination provisions of Ohio's Laws Against Discrimination. *Backus v. Baptist Medical Center,* 510 F. Supp. 1191, 25 FEP Cases 8092 (E.D. Ark. 1981); *Fesel supra.*

5. Respondent proved there was a factual basis for its belief that some female patients would object to being viewed in the nude or having their genitals touched by males. The testimony of the physician who treated many of Respondent's female patients and the nurses who cared for them supported this conclusion. The Commission did not present any evidence to the contrary.

6. However, Respondent failed to prove it could not rearrange its method of assigning work to nurse's aides to eliminate the privacy problem. In fact, the evidence showed that Respondent's policy of hiring only female nurse's aides violates the privacy interests of its male patients who might object to being viewed in the nude or touched in the genital area by females. *See, Jones v. Hinds General Hospital,* 666 F. Supp. 933, 44 FEP Cases 1076 (S.D. Miss. 1987). (Hospital was required to have at least one male orderly on duty to protect male patients' privacy interests)." (Petition at p. A-55 and A-56).

Based on all the evidence presented at the hearing and the hearing examiner's recommendation, the Commission issued its Findings of Fact, Conclusions of Law and Order on October 6, 1988, which stated that the Commission had proven by reliable, probative and substantial evidence that Little Forest had discriminated against Mr. Lawson in violation of 4112.02(A) of the Revised Code.

On October 31, 1988, Little Forest filed a Complaint and Petition for Judicial Review of the Final Order of the Ohio Civil Rights Commission with the Summit County Court of Common Pleas. On September 28, 1989, the common pleas court affirmed the Order of the Commission.

Little Forest appealed the common pleas court decision to the Ninth District Court of Appeals. On April 11, 1990, the court of appeals reversed the decisions of the court of common pleas and the Commission. The court of appeals specifically held that the proof elements which are applicable to a case of discrimination based on an employer's policy which is neutral on its face but which has a disparate impact applied to Little Forest citing *Wards Cove Packing Co., Inc. v. Antonio* 490 US 642, (1989). The court of appeals further held that Little Forest had offered Mr. Lawson substantially similar work tolling Little Forest's backpay liability.

The Commission then filed a notice of appeal to the Supreme Court of Ohio with the Ninth District Court of Appeals on May 10, 1990. The Commission filed its Memorandum in Support of Jurisdiction on June 10, 1989 and Little Forest filed a cross appeal. The Supreme Court accepted the case for review on October 5, 1990.

After briefing and oral argument the Ohio Supreme Court issued an opinion on September 4, 1991 in which it articulated evidentiary standards which apply in a case where an "employer has facially discriminatory practices and the employer seeks to justify gender specific hiring criteria on the basis that such criteria constitutes a bona fide occupational qualification". The court held that the employer bears the following burdens of proof:

(1) that the gender-based criteria involve the essence of the employer's business, and

(2) either that(;)

(a) all or substantially all members of the gender excluded by the employer are incapable of performing the job safely and efficiently, or

(b) it is impossible or impracticable to make determinations of each applicant's qualifications in a non-discriminatory manner.

(Petition at p. A-11 and A-12).

The Ohio Supreme Court further held that the appellate court's basis for holding that the job offer to Mr. Lawson was substantially equivalent to that of a nurse's aid was erroneous. The Ohio Supreme Court stated that the appellate court cited no evidence or reasoning in support of its finding of substantially similar employment.

On September 13, 1991 Little Forest filed a motion for reconsideration of the Supreme Court's decision. On September 20, 1991 the Commission filed its motion contra to Little Forest's Request for Reconsideration.

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. Neither The Decision Below Nor The Record Raises The First Two Questions Presented In The Petition

The first question presented in the petition (Petition p. i) is whether gender (female) can be used as a bona fide occupational qualification for employment ("BFOQ), under Title VII of the Civil Rights Act of 1964 and Ohio Revised Code Chapter 4112, in a patient care position in a nursing home where female residents have expressed a desire for

care by a member of the same sex.

But the Ohio Supreme Court did not decide that question in this proceeding. Moreover, the facts of record will not support a determination of that question by this Court. Beginning with the hearing examiner's report and recommendation (Petition at A-55 and A-57) which was adopted by the Respondent, the legal standard applied in the instant case is embodied in the federal court decisions of *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346, (D. Del. 1978), aff'd 591 F.2d 1334, 19 FEP Cases, 887 3rd Cir. 1979, *Bachus v. Baptist Medical Center,* 510 F. Supp. 1191, (E.D. Ark. 1981) and *Jones v. Hinds General Hospital,* 666 F. Supp. 933, (S.D. Miss. 1987). The legal standard articulated by those courts specifically sets forth evidentiary standards in a BFOQ case where the personal privacy rights of "customers" (patients) are at stake. Therefore contrary to the Petitioner's assertions (Petition p. 10) there is no disagreement as to the substantitive legal test to be applied in a BFOQ case based upon considerations of privacy. Moreover, the Ohio Supreme Court's decision is consistent with the evidentiary standards articulated in *Fesel, Bachus* and *Jones, supra.* (Petition at A-11 and A-12, n. 3).

The court of appeals ruled that the evidentiary framework articulated by this Court in *Wards Cove*[1] was applicable in this case even though the evidentiary framework in *Wards Cove* applies to a discrimination case where the employment practice is neutral on its face but has a discriminatory impact. (Petition p. A-32). The Respondent sought review of the court of appeals decision raising the following assignment of error:

> When An Employer Asserts A Bona Fide Occupational Qualification (BFOQ) Based On the Privacy Interests Of Its Clients As A Defense To Unrefuted Evidence Of Discrimination, The Employer Must Prove That It Had A Factual Basis For Believing That The Hiring Of Any Members Of

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[1] *Wards Cove Packing Co., Inc. v. Antonio* (1989), 490 U.S. 642.

> One Sex Would Directly Undermine The Essence Of The Job Involved Or The Employer's Business, And That It Could Not Rearrange Job Responsibilities In Such A Way That There Would Be A Minimal Clash Between The Privacy Interest Of The Clients And The Employment Opportunities of the Complainant. (Petition at p. A-116).

The question which was therefore decided by the Ohio Supreme Court deals with the issue of upon whom the evidentiary burdens are placed when the employer asserts the privacy interest of its clients as a basis for a BFOQ defense.

Before the Ohio Supreme Court the Petitioner argued:

> In A Case Alleging Sex Discrimination In Employment, Once The Employer Proves That The Essence Of It Business Operation Would Be Undermined Unless It Could Employ Members Of One Sex Exclusively, Then The Burden Shifts To The Complainant To Prove That Alternative Means Are Available To Moot The Need For Gender Based Discrimination And Still Achieve The Legitimate Business Interest Of The Employer. (Petition at p. A-118).

The court dismissed the Petitioner's argument by stating the following:

> It is the contention of the [Petitioner] that it may utilize the less demanding "business justification standard announced in *Wards Cove v. Antonio, supra*. However as seen in *Johnson Controls* this test is unavailable where the employer applies facially discriminatory hiring criteria." (Petition at p. A-10).

The Ohio Supreme Court's analysis of the BFOQ affirmative defense went further than the particular factual situation presented to it and outlined the evidentiary standards

articulated by this Court in *Dothard*,[2] *Western Airlines v. Criswell*[3] and *Diaz*[4] when the employer relies upon the BFOQ defense on a basis other than the privacy interest of clients. (Petition at p. A9). The privacy interest of clients is a narrow factual situation which has not been addressed by this Court and the lower courts have articulated evidentiary standards which apply to such factual situations, which, contrary to the Petitioner's assertion, recognizes that the privacy interest of clients is a valid basis for asserting the BFOQ defense. (Petition at p. A-11 n. 3).

In the Petition at p. 10 the Petitioner asserts that "[. . .] various state and federal courts disagree as to the substantive legal test to be applied in a BFOQ case based upon considerations of privacy." However the Petitioner does not cite the decisions which it claims are in disagreement.

The Petitioner argues at p. 12 that "[a] balance must be struck" between the competing rights of privacy and nondiscrimination in employment. However the Petitioner is not looking for a balance but is seeking an imbalance which would permit the employer to engage in overt discrimination without justifying its basis for doing so and therefore diminish the state and federal law's goal of ensuring equal employment opportunity. As this Court has recognized in *Dothard v. Rawlinson* and *Western Air Lines Inc. v. Criswell* the BFOQ exception to discrimination in employment constitutes an exception to the public policy embodied in Title VII as a whole to eliminate discrimination and as such is to be construed narrowly by the courts.

The second question raised by the Petitioner is inextricably intertwined with the Petitioner's failure to accept the applicable rule of law which places the evidentiary burdens

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[2] *Dothard v. Rawlinson* (1977), 433 U.S. 321

[3] *Western Airlines v. Criswell* (1985), 472 U.S. 400

[4] *Diaz v. Pan-American World Airways, Inc.* (C.A. 5, 1971), 442 F.2d 385.

in a BFOQ case upon the employer. The *Wards Cove* evidentiary framework is inapplicable to a case where the employment practice is discriminatory on its face and the employer is asserting a BFOQ defense as a basis for overt discrimination. To accept the Petitioner's argument would again ignore the *Diaz* decision's guidance to construe the defense narrowly because it is an exception to the public policy embodied in Title VII.

**2. The Decision Below Does Not Raise The Third Question Presented In The Petition.**

The third question presented in the petition is whether the Court's ruling in *Ford Motor Company v. EEOC*, 458 U.S. 219 (1988), requires that an offer of employment be in the "career track" of the discriminatee in order to toll the employer's backpay liability, despite the fact that the employer was offered employment at a higher rate of pay and in a position having the same terms and conditions of employment.

The Ohio Supreme Court did not decide the above stated question. At p. 18 of the Petition the Petitioner asserts that the Ohio Supreme Court's ruling is a departure from this Court's ruling in *Ford Motor.* However the Ohio Supreme Court's ruling is in agreement with the *Ford Motor* decision because this Court stated that in order for the claimant to mitigate his damages, "* * * the claimant need not go into another line of work, accept a demotion or take a demeaning position." (Appendix at p. 1). The Ohio Supreme Court's opinion is consistent with *Ford Motor* because a maintenance position such as the one which was offered to Mr. Lawson is not in the same line of work as a nurse's aid position and is also demeaning because it would require Mr. Lawson "to perform such duties as stripping and cleaning rooms while the patient was not in the room." (Appendix at p. 3).

The Ohio Supreme Court's determination that a nurse's aid position is not relevant to career development in the health care industry is in accord with this Court's statement

in *Ford Motor* that in order to mitigate damages the complainant is not required to go into another line of work or take a demeaning position. The Petitioner at p. 18 of the Petition puts great emphasis on the fact that the maintenance position which was offered to Mr. Lawson would have been for higher pay and that the hours, working conditions and pay were similar. However Websters New World Dictionary 2nd Ed. (1978) 375 defines the word demean as follows:

"to lower in status or character; degrade; humble"

The Ohio Supreme Court's decision is simply in accord with the evidence in the record which supports the fact that the maintenance position, which would have required Mr. Lawson to perform the duties of stripping and wiping floors, was lower in status than the nurses-aid position.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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**PROPOSITION OF LAW NO. 2:**

**BACK PAY IN A DISCRIMINATION CASE UNDER R.C. CHAPTER 4112 IS NOT TOLLED WHERE THE COMPLAINANT REFUSES AN UNCONDITIONAL OFFER OF A POSITION THAT IS INCONSISTENT WITH HIS SKILLS, BACKGROUND AND EXPERIENCE AND INVOLVES CONDITIONS WHICH ARE SUBSTANTIALLY MORE ONEROUS THAN THE POSITION FOR WHICH HE WAS SEEKING EMPLOYMENT.**

In *Ford Motor Co.* v. *EEOC* (1981), 458 U.S. 219, the United States Supreme Court held that a claim for back pay is tolled where the claimant refuses an unconditional offer of substantially equivalent employment. The court stated that the primary goal of Title VII is to end discrimination. As a result, the court found that the employer's unconditional offer to the claimant of the originally sought but denied job fulfilled the goals of Title VII. Significantly, the court also stated that in order to mitigate his damages, "* * * the claimant need not go into another line of work, accept a demotion or take a demeaning position." *Id.* at 231.

In the case at bar, Little Forest did not offer Mr. Lawson his previously denied job of nurse's aide which involved personal care of patients. Instead, Little Forest offered him a more demeaning job of maintenance man where he would have been required to perform such duties as stripping and cleaning rooms while the patient was not in the room.

In issuing the *Ford* decision, the United States Supreme Court was following a line of prior opinions on the issue of backpay. In *NLRB* v. *Madison Courier, Inc.* (D.C. Cir. 1972), 472 F. 2d 1307, the court held that an employee does not have to seek employment which is not consistent with his skills, background and experience or "which involve conditions which are substantially more onerous than his previous position." *Id.* at 1320-1321. In *Spaqnuolo* v. *Whirlpool Corp.* (W.D. N.C. 1982), 548 F. Supp. 104, *modified* (on other grounds) (1983), 717 F. 2d 114, the court ruled that an

employee demoted from a position as sales manager in violation of ADEA did not have to accept an "essentially different" position as a traveling salesman in order to mitigate his damages.

In the instant case, Mr. Lawson did not apply for a position as a janitor, rather he applied for a job as a nurse's aide or an electrical technician. The Complainant had experience as both a nurse's aide and as an electrical technician.

Based on the parameters set forth in *Ford* and other above cited cases, the Commission found that a janitorial position was not substantially equivalent to a nurse's aide position. However, the Ninth District Court of Appeals held that Little Forest made a reasonable accommodation because the position paid more and involved "substantially similar" work. Thus, the court of appeals decision would allow an employer to offer a position that may pay more but is not consistent with the employee's skills and then be relieved of back pay liability.

Supervisor or head nurse, she said that — she stated that they couldn't hire me because the female patients would object to my examining them.

Q. Have you looked for work since you were denied that job?

A. Yes, I have.

Q. And have you received any offers?

A. From Little Forest, I did.

Q. When you said you received an offer from Little Forest, what was that offer?

A. It was a job as a maintenance man.

Q. Do you know what that job would consist of?

A. Consists of mopping floors and so forth, buffing floors and thing of that nature.

Q. Did you accept that position?

A. No, I didn't.

Q. Why didn't you accept that?

A. I felt that it wasn't comparable to — it wasn't really comparable, 'cause I feel that I'm more qualified than a job as far as mopping floors and sweeping, waxing, what not.

Q. Was that the type of job you originally applied for?

A. No, it wasn't.

Q. No further questions.

Hearing Examiner Martens: Okay. It will be cross examination then.